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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. RICHARD ISSEL, Defendant and Appellant.	G040274 (Super. Ct. No. 07HF2005) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Jane L. Shade, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Reversed.

Lauren E. Eskenazi, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Melissa Mandel and James D. Dutton, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

A jury convicted defendant Richard Issel of selling a controlled substance (Health & Saf. Code, § 11352, subd. (a)), second degree burglary (Pen. Code, §§ 459, 460), and obtaining a controlled substance by fraud (Health & Saf. Code, § 11173, subd. (a)). He argues the trial court erred when it admitted evidence of uncharged misconduct under Evidence Code section 1101, subdivision (b).[1] For the reasons expressed below, we reverse the judgment.

I

FACTUAL AND PROCEDURAL BACKGROUND

On September 25, 2007, Costa Mesa Police Officer Matthew Selinske, posing as a prospective purchaser of Oxycontin tablets, spoke on the telephone with a seller later identified as Michael Stromgren and arranged to purchase 20, 80-milligram tablets for $30 per tablet. They agreed to meet at a Costa Mesa shopping center. Stromgren arrived in a cream-colored Chrysler sedan driven by Ryan Steinhoff. They consummated the transaction in Selinske's car. During the exchange, undercover surveillance officers observed Steinhoff discard something in a trash can. Investigators later recovered a pill bottle with a missing prescription label. Detectives did not arrest the men, hoping to learn the identities of confederates.

On the morning of October 1, Selinske arranged to purchase 60 additional tablets from Stromgren, who asked to change the location to a Fountain Valley warehouse store. When Selinske said he was at the same location where the first transaction occurred, Stromgren agreed to meet him there. Stromgren again arrived in the Chrysler with Steinhoff driving. Stromgren and Steinhoff walked to the trunk, and then Stromgren walked to Selinske's car and completed the transaction. Again, Steinhoff discarded an item into a trash can. Selinske contacted other detectives surveilling the location to make an arrest, and drove away.

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[1] All further statutory references are to the Evidence Code.

The detectives stopped the Chrysler before it left the parking lot and arrested its occupants. Defendant sat in the rear passenger seat. A detective searched the trash can for the items Steinhoff discarded and found a warehouse store pharmacy bag, a pharmacy receipt for $487.21, and a prescription label in the name of Alfred Gallegos, Steinhoff's brother-in-law. Steinhoff had previously used his brother-in-law's name to obtain Oxycodone illegally. Detectives found the $1,800 buy money on the floorboard of the front passenger seat. Next to the money, they found a backpack containing a day planner with information about drug prices. They also found a car rental contract for the Chrysler in Steinhoff's name. At the time of booking, defendant had $71.50 in his possession and no wallet. Stromgren had $3, and Steinhoff had no money.

Defendant told a detective after his arrest Stromgren called that morning asking to borrow $150. Defendant agreed to loan him the money if Stromgren would drive him to a meeting with his probation officer in Santa Ana. Stromgren promised to pay defendant back the same day because defendant needed the money to pay his rent. Stromgren picked him up in Anaheim and, after withdrawing the money from defendant's ATM, they drove to the Fountain Valley warehouse store. Steinhoff went inside and returned minutes later and they drove to Costa Mesa. Defendant told the detective he was not involved in the drug transaction, did not know what the money was for, and did not know what was going to happen. He also stated he was moving from Anaheim to Newport Beach, he was unemployed, and he received government disability payments.

Defendant's testimony at his preliminary hearing was read into the record at trial. He testified he had been staying at an Anaheim hotel but was moving to a new residence on October 1. He had an appointment with his probation officer, who threatened to find him in violation of probation and send him to jail if he missed or was late for his 11:00 a.m. appointment. Stromgren called and asked to borrow $150. This was not unusual because Stromgren borrowed money from defendant every week, usually

$10 or $15. Stromgren never told him what he needed it for and defendant never asked. Defendant explained he knew Stromgren from Desert Storm and "[i]f he asked for the shirt off my back, I would have given it to him."[2] Defendant told Stromgren he would lend him the money if Stromgren could get him to his probation appointment on time. Stromgren arrived with Steinhoff, who defendant did not know, and they drove to an ATM so defendant could withdraw $160 and give it to Stromgren. He told Stromgren he had to be at his appointment in 45 minutes and to wake him when they arrived. He fell asleep in the back seat and awoke when someone slammed the door at the warehouse store. He awoke again to see a police officer pointing a gun at his face.

Defendant's probation officer testified defendant did not have an appointment on October 1. He believed the last time they had spoken was at a July 23, 2007, office visit. Defendant failed to appear for a subsequent appointment in August. The probation officer had not threatened to arrest defendant, explaining he could not be arrested for failing to report because he had been placed on probation pursuant to Proposition 36, a drug rehabilitation program that prohibited arresting participants unless they had prior probation violations.

Thomas Burkard testified defendant was a family friend who had lived with Burkard's family and was the project manager at Burkard's glass company in Cotati in April 2002. On Monday April 29, 2002, Burkard discovered his business had been burglarized over the weekend. The thief or thieves stole about $30 cash, a laptop computer, a camera, a calculator, telephones, and a rotohammer. Burkard ascertained the security system had been disabled using defendant's unique code. He confronted defendant, who appeared upset when hearing about the burglary and protested that he would never steal from Burkard. Defendant explained to Burkard that several people visited him at the shop while working over the weekend. He became ill, left the store to

[2] Defendant told the probation officer he knew Stromgren from their service together in the United States Marine Corps.

sit in his car and fell asleep. When he awoke, his friends were gone. He secured the building, reset the alarm, locked the door, and left. At the time, defendant was a salaried employee making $50-60,000 a year. Burkard demanded his property back. A woman returned the laptop that afternoon, and Burkard subsequently received all or most of the other property back, but he could not recall from whom. Burkard did not believe defendant stole the items.

Stromgren and Steinhoff pleaded guilty to charges stemming from the sale to Selinske on October 1st. Stromgren testified and generally corroborated defendant's statements and prior testimony. Stromgren explained he needed money to pay Steinhoff for an earlier loan. He and Steinhoff dropped the prescription off the morning of October 1 before calling defendant. He had borrowed money from defendant three or four times previously in amounts ranging from $100 to $150. He denied discussing the pending drug transaction in the car during the drive from Anaheim to Fountain Valley to Costa Mesa. He testified defendant had no knowledge he and Steinhoff "were doing a dope deal" and was "never part of it." Steinhoff testified he did not have enough cash to buy the Oxycontin so Stromgren called defendant and asked to borrow money without saying why he needed it, but he maintained defendant "had nothing to do with the situation."

The jury convicted defendant of the offenses listed above. The court imposed the midterm sentence of four years for selling a controlled substance and concurrent sentences on the other counts.

II

DISCUSSION

The Trial Court Prejudicially Erred by Admitting Evidence of the Burkard Theft

Defendant contends the trial court erred by admitting Burkard's testimony concerning defendant's involvement in the uncharged theft of certain items from Burkard's store. The court accepted the prosecutor's argument the evidence was

admissible under section 1101, subdivision (b), because it showed defendant used the same common scheme or plan in the Burkard theft and in committing the charged offenses of commercial burglary and sale of a controlled substance. While it is arguable, the Burkard incident may have been admissible on other issues, such as knowledge or intent, it should not have been admitted on the prosecutor's theory of common scheme or plan. This case underscores the importance of carefully tailoring the exceptions of section 1101, subdivision (b), to the particular issues presented at trial.

A trial court's decision to admit evidence under section 1101, subdivision (b), "being essentially a determination of relevance, is reviewed for abuse of discretion." (*People v. Carter* (2005) 36 Cal.4th 1114, 1147.) Relevant evidence is defined as evidence "having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (§ 210.) "The test of relevance is whether the evidence tends '"logically, naturally, and by reasonable inference" to establish material facts such as identity, intent, or motive. [Citations.]'" (*People v. Scheid* (1997) 16 Cal.4th 1, 13.) The trial court lacks discretion to admit irrelevant evidence. (*Id.* at p. 14.)

Evidence that a defendant committed crimes other than those currently charged may not be admitted to prove his or her bad character or criminal disposition. (§ 1101, subd. (a).) But "[n]othing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, or whether a defendant in a prosecution for an unlawful sexual act or attempted unlawful sexual act did not reasonably and in good faith believe that the victim consented) other than his or her disposition to commit such an act." (§ 1101, subd. (b).)

The uncharged crime must share sufficiently similar features to the charged offense to support a rational inference of identity, a common plan, or intent. (*People v.*

Ewoldt (1994) 7 Cal.4th 380, 402-403 (*Ewoldt*).) The requisite degree of similarity varies according to the purpose of the evidence. To prove *identity,* for example, the charged and uncharged offenses must display a "'pattern and characteristics . . . so unusual and distinctive as to be like a signature.'" (*Id.* at p. 403.) A *common design or plan,* in contrast, requires common features "indicat[ing] the existence of a plan rather than a series of similar spontaneous acts, but the plan thus revealed need not be distinctive or unusual." (*Ibid.*) The least degree of similarity between charged and uncharged crimes is required to establish adequate relevance for admission on the issue of *intent.* (*Id.* at p. 402.) The evidence of the uncharged crimes need only be "sufficiently similar [to the charged offenses] to support the inference that the defendant '"probably harbor[ed] the same intent in each instance." [Citations .]'" (*Ibid.*) Defendant's not guilty plea placed all elements of the charged crimes in issue (*Id.* at p. 400, fn. 4.)

Here, the trial court admitted the evidence to demonstrate a common scheme or plan, finding the uncharged offense shared similarities with the charged crimes. Specifically, the court noted defendant in both instances helped others commit a nonviolent offense, and defendant offered a similar defense: he was unaware of the crime and asleep in a car because of illness. The court also found the probative value of the evidence outweighed its prejudicial effect and therefore section 352 did not require exclusion of the evidence. Finally, the court instructed the jury to consider the evidence only for the limited purpose of determining whether defendant used a common plan to commit the charged offenses.[3]

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[3] The instruction provided in part, "The People are going to present evidence of other conduct by the defendant that is not charged in this case . . . . You may consider the evidence . . . only if the People prove it by a preponderance of the evidence that the defendant, in fact, committed the uncharged acts. . . . [¶] [I]f you decide that the defendant committed the uncharged acts that you are going to hear about, you may, but are not require[d] to, consider the evidence for the limited purpose of deciding whether or not the defendant had a common plan or scheme to commit the offenses that are alleged

No matter the similarities at this point in the trial, the evidence should not have been admitted on a theory of common plan. As *Ewoldt* explains, the "distinction, between the use of evidence of uncharged acts to establish the existence of a common design or plan as opposed to the use of such evidence to prove intent or identity, is subtle but significant. Evidence of *intent* is admissible to prove that, if the defendant committed the act alleged, he or she did so with the intent that comprises an element of the charged offense. 'In proving intent, the act is conceded or assumed; what is sought is the state of mind that accompanied it.' [Citation.] For example, in a prosecution for shoplifting in which it was conceded or assumed that the defendant left the store without paying for certain merchandise, the defendant's uncharged similar acts of theft might be admitted to demonstrate that he or she did not inadvertently neglect to pay for the merchandise, but rather harbored the intent to steal it. [¶] Evidence of a common design or plan is admissible to establish that the defendant committed the *act* alleged. Unlike evidence used to prove intent, where the act is conceded or assumed, '[i]n proving design, the act is still undetermined. . . .' [Citation.] For example, in a prosecution for shoplifting in which it was conceded or assumed that the defendant was present at the scene of the alleged theft, evidence that the defendant had committed uncharged acts of shoplifting in a markedly similar manner to the charged offense might be admitted to demonstrate that

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in this case. [¶] In evaluating this evidence, consider the similarity or lack of similarity between the uncharged acts, which you'll hear about from this witness who will testify next, and the charged [offenses]. Do not consider this evidence that you're going to hear . . . for any purpose other than the limited purpose of determining whether the defendant had a common plan or scheme to commit the offenses that are charged in this case. [¶] . . . [¶] Do not conclude from this evidence that the defendant has a bad character or is disposed to commit any crimes. If you conclude that the defendant committed the uncharged acts, that conclusion is only one fact to be considered along with all the other evidence. It is not sufficient by itself to prove that the defendant is guilty of [the charged offenses]. The People must still prove each element of every charge of each of the crimes that are alleged in this case beyond a reasonable doubt."

he or she took the merchandise in the manner alleged by the prosecution." (*Ewoldt, supra,* 7 Cal.4th at p. 394, fn. 2.)

The prosecution charged defendant with crimes related to the illegal procurement and sale of prescription narcotics. The prosecution proceeded on a theory defendant aided and abetted or conspired to commit the charged crimes. A person is guilty as an aider and abettor where he assists or encourages the perpetrator with knowledge of the criminal purpose and with an intent or purpose of committing, encouraging, or facilitating the offense. (*People v. Beeman* (1984) 35 Cal.3d 547, 560.) A person is guilty as a conspirator where he agrees with others to commit a crime.

According to the prosecution, defendant's act of aiding and abetting occurred when he gave Stromgren the money to purchase the prescription drugs. This issue was not in dispute. The prosecution earlier had introduced defendant's pretrial statement to a detective admitting he furnished the money to Stromgren, and he repeated this admission when his preliminary hearing testimony was read to the jury before the court ruled on the Burkard evidence. Thus, the issue in the case was not whether defendant aided and abetted Stromgren's criminal enterprise, but whether he did so with the requisite knowledge and intent.

The Attorney General concedes "the prosecutor did not present the uncharged offense for the purpose of intent," but argues there was no error because the trial court could have admitted the evidence under this theory. But the trial court did not instruct the jury to consider the Burkard evidence on the issues of whether defendant knew of Stromgren and Steinhoff's criminal purpose and intended to facilitate their offenses. Rather, the court limited the evidence to whether there was a common scheme or plan, i.e., whether defendant committed uncharged acts in a "markedly similar manner" (*Ewoldt, supra,* 7 Cal.4th at p. 394, fn. 2.) to the charged offenses such that it demonstrated he *acted* in the manner alleged by the prosecution.

Moreover, it is by no means clear the trial court would have admitted the evidence of the Burkard theft on the issue of intent. As *Ewoldt* explains, "to prove intent, the uncharged misconduct must be sufficiently similar to support the inference that the defendant '"probably harbor[ed] the *same intent* in each instance." [Citations.]'" (*Ewoldt, supra,* 7 Cal.4th at p. 402, italics added.) The state of mind at issue in the Burkard incident was the intent to steal property, while the intent at issue in the charged crimes was whether defendant harbored the intent to facilitate a drug transaction.

Nor is it clear the trial court would have found that the prosecutor had established the requisite foundation to admit evidence of the Burkard theft. (§ 403, subd. (a) [trial court must determine whether there is evidence sufficient to sustain a finding of the existence of the preliminary fact]; *People v. Simon* (1986) 184 Cal.App.3d 125, 131 (*Simon*) [trial court's obligation to determine whether jury could find by preponderance of the evidence the existence of the preliminary fact from the proponent's evidence].) Here, the Attorney General retrospectively defends admission of Burkard's testimony to show defendant's criminal intent, but arguably Burkard's testimony established only that a theft occurred at his shop. Indeed, Burkard testified defendant adamantly denied knowledge of the theft, and Burkard did not believe defendant was responsible.

Even if the court had found the prosecution established the necessary foundation to admit Burkard's testimony, the court reasonably could have determined the evidence warranted exclusion under section 352. Under these facts, the court could conclude the marginal relevance of the Burkard theft posed an unfair risk the jury would use the incident to find defendant harbored a general disposition to commit crime and therefore find the prejudicial effect of the evidence outweighed its probative value. We therefore cannot say the trial court would have admitted Burkard's testimony on the issue of intent, as the Attorney General urges. As *Ewoldt* emphasized, different determinations are required when analyzing whether evidence of uncharged acts show identity, common

plan, or intent. Consequently, "it is imperative that the trial court determine specifically what the proffered evidence is offered to prove, so that the probative value of the evidence can be evaluated for that purpose." (*Ewoldt, supra,* at 7 Cal.4th at p. 406.) Defendant is entitled to have the trial court and jury make this fact-based inquiry. (*Simon, supra,* 184 Cal.App.3d at p. 132 [judgment reversed to give defendant the benefit of a trial court evaluation of the sufficiency of the evidence under section 403, subdivision (a)].)

The Attorney General also argues the trial court did not err because the evidence could have been admitted to impeach defendant's preliminary hearing testimony. The fact remains, however, the court instructed the jury to consider the evidence solely to determine whether defendant acted under a common plan. We fail to see how the possibility of an alternative basis for admissibility in any way cures the error that occurred here.

Finally, the Attorney General argues any error was harmless because of the "strong evidence" of defendant's guilt, the limiting instruction on other crimes evidence, the noninflammatory nature of the uncharged offense and defense counsel's plea in closing argument to view the evidence with caution. We are not persuaded the error here was harmless.

"Erroneous admission of other crimes evidence is prejudicial if it appears reasonably probable that, absent the error, a result more favorable to the defendant would have been reached." (*People v. Felix* (1993) 14 Cal.App.4th 997, 1007-1008.) A reasonable probability is a probability sufficient to undermine confidence in the outcome of the proceedings. (*In re Neely* (1993) 6 Cal.4th 901, 909.)

The evidence of defendant's guilt was not particularly strong. (*People v. Richardson* (2008) 43 Cal.4th 959, 1024 [presence at the scene of a crime or failure to prevent its commission is not sufficient to establish aiding and abetting].) Apart from his statements and preliminary hearing testimony that he loaned Stromgren money, the

prosecution did not introduce any other evidence defendant knowingly and intentionally assisted Stromgren in the crime. Moreover, defendant adamantly and consistently denied knowledge of Stromgren and Steinhoff's plans. Given their shared military service, it does not strain credulity to believe defendant would make a "no questions asked" loan and that Stromgren might not involve his former comrade in his scheme with Steinhoff. Defendant told an interviewer he was groggy from taking medication. His probation officer corroborated defendant had medical issues, and he was overdue for a visit even if he did not have an "appointment." Significantly, no evidence connected defendant with the September 25 incident involving Stromgren and Steinhoff. And both Stromgren and Steinhoff pleaded guilty to the charges and testified defendant had nothing to do with the crimes.

This is not to suggest there were no reasons to doubt defendant's account. For example, defendant's loan conveniently comprised approximately one-third of the purchase price for the prescription, and defendant did not have an appointment with his probation officer. But no facts are presented which lead us to conclude defendant's account was implausible and therefore the jury was not influenced by the erroneous admission of the Burkard theft, as the Attorney General claims. The limiting instruction and the nature of the theft do not enhance our confidence in the outcome. Simply put, admitted solely on an insupportable theory of common scheme or plan, evidence of the Burkard theft presented an unacceptable risk the jury would reject the defense because defendant years earlier lied and stole from his friend and employer.

III

DISPOSITION

The judgment is reversed.

ARONSON, J.

WE CONCUR:

SILLS, P. J.

O'LEARY, J.